

From a reading of this clause it is quite apparent that what this clause deals with is a situation where the amount recovered on the sale of the property charged is less than the amount due under the charge. In the instant case it is not disputed that the charge was only stamped up to \$140,000 and the law is clearly established that, in such circumstances, the chargor or chargors is or are only liable up to the amount covered by the stamping and no more (*In re Waterhouse's Policy*⁽¹⁾). From this it must follow that the plaintiffs' claim must stand dismissed with costs. Perhaps had the action been against the defendant, as partner in a firm to which the plaintiff bank had lent monies without security, the presentation and arguments addressed to me might well have been different.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; Yeo Kee Chin & Co.*

HENRY & CO. (PTE.) LTD. v. JOHN GOUW & ANOR.

[O.C.J. (D'Cotta J.) October 28, 1980]

[Singapore — Civil Suit No. 669 of 1974]

Contract — Contract for work done and materials supplied — Claim for payment of balance — Counterclaim for defective work.

The plaintiffs in this case claimed that they had carried out and completed all the works and supplied all the necessary materials in accordance with 8 orders and consequently were entitled to payment. The defendants on the other hand claimed that the plaintiffs had failed to perform the contracts in accordance with the specifications and that the workmanship and materials were poor and defective.

Held, allowing the plaintiffs' claim and dismissing the counter-claim: (1) the plaintiffs had performed the work in accordance with the invoices and confirmation orders as set out in the claim and as such they were entitled to payment;

(2) the remedy for the defendants if as they alleged the work was not performed according to the specifications, or that part of the work was not done, or that materials supplied were defective and that generally the work was badly done, was to bring a cross-claim for the defects and omissions in a proper manner with supporting evidence, or, alternatively set them up in diminution of the price;

(3) the onus was upon the defendants to show that such was the case but from the evidence, the defendants had failed to discharge that onus.

Case referred to:-

(1) *Hoenig v. Isaacs* [1952] 2 All E.R. 176.

CIVIL SUIT.

Mahmood Fadjjar for the plaintiffs.

Cheong Yuen Hee for the defendants.

D'Cotta J.: This is a claim by the plaintiffs, Henry & Co. (Pte.) Ltd. against both defendants, Mr. and Mrs. John Gouw for the sum of \$48,971.53 being the balance due for work done and materials supplied at the request of the defendants in respect of repairs, renovations and redecoration work to No. 79 Dunbar Walk, Singapore.

The entire work and materials supplied by the plaintiffs can be found in the following eight invoices

A and confirmation orders in which are embodied the contract price, the methods of payment as well as the terms and conditions of sale. They are:—

- | | | |
|-----------------------------------|---|-------|
| 1. Invoice No. 4386 dated 20.7.73 | — | AB-4 |
| Confirmation Order dated 29.11.72 | — | AB-1 |
| 2. Invoice No. 4387 dated 20.7.73 | — | AB-7 |
| Confirmation Order dated 21.3.73 | — | AB-6 |
| 3. Invoice No. 4388 dated 20.7.73 | — | AB-12 |
| Confirmation Order dated 21.3.73 | — | AB-8 |
| 4. Invoice No. 4389 dated 20.7.73 | — | AB-17 |
| Confirmation Order dated 21.3.73 | — | AB-15 |
| 5. Invoice No. 4390 dated 20.7.73 | — | AB-19 |
| Confirmation Order dated 6.6.73 | — | AB-18 |
| 6. Invoice No. 4354 dated 5.7.73 | — | AB-21 |
| Confirmation Order dated 29.6.73 | — | AB-20 |
| 7. Invoice No. 4419 dated 6.8.73 | — | AB-24 |
| Confirmation Order dated 16.7.73 | — | AB-22 |
| 8. Invoice No. 5002 dated 12.4.74 | — | AB-27 |
| Confirmation Order dated 20.11.73 | — | AB-26 |

The total cost for the entire work to be done including materials supplied amounted to \$60,979.53. The plaintiffs received two payments: one for \$7,000 by way of deposit and the second for \$5,000 was made in January 1974. The plaintiffs' claim is for the balance and costs.

D It is interesting and important as well at this stage to take note that all the eight invoices with supporting confirmation orders were signed by either the 1st or 2nd defendant in which were printed the following conditions — In the case of confirmation orders thus —

E "Please sign and return to us this confirmation copy together with the deposit as works will only be started from date of receipt of the deposit and this signed confirmation."

In the case of invoices, thus —

F "Complaints, if any, must be made in writing within 7 days after receipt of this invoice, otherwise will not be entertained. If this invoice has not been paid within 30 days an interest of 1% on the total of this invoice will be charged per month."

In addition to this, with every confirmation order is attached on the reverse a "Conditions of Sale" — see AB3 in which various conditions and terms of contract are set out.

G The plaintiffs claim is simply that they had carried out and completed all the works and supplied all the necessary materials in accordance with the eight orders and consequently are entitled to payment.

H The defendants on the other hand contend that the plaintiffs had failed to perform the contracts in accordance with the specifications; that they failed to supply certain materials and/or labour which they contracted for and generally the works were badly executed the materials were defective and workmanship poor: in short the work was not done to the expectations and satisfaction of the 2nd defendant (hereinafter called "Mrs. Gouw"). I might mention here that Mrs. Gouw dealt mostly with the plaintiffs in this dispute.

I Mr. Luke Yong (PW1) managing director of the plaintiffs firm gave evidence in a straightforward manner. He stated that he had been in this business of interior decoration for more than 27 years. The gist of his evidence was that the plaintiffs had carried out their work stage by stage methodically from the 1st confirmation order signed by the defendants on No-

vember 29, 1972 to the last confirmation order signed by the defendants on November 20, 1973. While work was in progress from the commencement of stage 1, never at any time was there any complaint in writing from either of the two defendants to the effect that there was short supply of materials, that certain job was not done, that materials supplied were inferior in quality or defective and that the workmanship was bad. Thereafter confirmation orders continued to be issued and signed by the defendants. It was also the plaintiffs' case and I have no reason to disbelieve the evidence of Mr. Luke Yong that after some discussions payments were to be made in accordance with the terms of a letter dated January 17, 1974 from the plaintiffs addressed to the 1st defendant Mr. John Gouw, marked and admitted as Exhibit D4 as follows:—

"Dear Sir,

Work done at 79 Dunbar Walk

We thank you for your BOA cheque 217953 for \$5,000 being part payment for the above work done.

With reference to the meeting amongst your goodself, Mrs. Gouw and Mr. Luke Yong, on your request it has been agreed that you will pay a further payment of \$5,000 before the 31st January 1974 and balance to be made by 4 instalments of \$10,000 p.m. for the months of February, March, April and May 1974.

Kindly confirm to us by return mail so that we can make arrangements to withdraw our legal proceedings against you from our solicitors.

Meanwhile we shall arrange to have adjustments of your bills after the New Year holidays. Thank you for your kind co-operation and wishing you a Very Prosperous New Year.

sd: HENRY & COMPANY."

There was no denial of the arranged meeting nor was the contents seriously challenged. I accepted the authenticity of the letter and admitted it in evidence.

The defendants' version was that Mrs. Gouw made numerous verbal complaints about the unsatisfactory work. It is pertinent to note from her evidence that she was present almost daily at the work site i.e. in the premises of 79 Dunbar Walk and short of supervising the work, she knew and saw what work was being carried out and she made verbal complaints to the Clerk of Works in charge namely Mr. Kang (DW1). In this connection I would like to quote the answers which she gave in cross-examination:—

"Q. During the time when you were in Singapore how often were you at the site.

A. Daily.

Q. For how long.

A. Sometimes a whole day, other times for a few hours.

Q. When you were away from Singapore, was Mr. Gouw at the site.

A. No, but I had a cousin who stayed at the site.

Q. You complained to DW1 often.

A. Yes.

Q. What did you complain about.

A. They were not installing what I had asked.

Q. But you received AB4 (1st confirmation order)

A. Yes, to DW1 he was the only one usually at 79 Dunbar Walk.

Q. Did you receive AB7 (another confirmation order).

A. I cannot remember.

Q. When you received the invoices you did not complain.

A. Yes, I did to DW1."

A Now this is what Mr. Kang (DW1) had to say:—

"Q. Your signature is at AB4.

A. Yes.

Q. What do you mean by 'check up'.

A. I have to check all the items on the invoices.

Q. You only sign when every item is correct.

A. Yes.

B Q. All work in AB4 had been done, you checked and being satisfied signed the invoice.

A. Yes, but in certain cases we issue certain invoices in advance in order to collect progress payment.

Q. What do you mean by check.

A. Check with confirmation orders.

Q. Do you go to the site to check.

A. No.

C Q. Put: That is not true as checking means to go to the site to see if work has been done.

A. Yes, I agree but that is not necessary at times."

Mr. Kang went further to admit under cross-examination that he had checked all the invoices from AB4-AB24 and the final question put to him was:—

D "Q. When you signed the invoices some part of the work must have been done.

A. Yes."

Mr. Kang also admitted in evidence that the renovation work was substantial. He also admitted that Mrs. Gouw's verbal complaints were mostly on the misunderstanding as to who should obtain approval from the Building Control Division before certain work could be proceeded with. No where in Mr. Kang's evidence-in-chief was he ever examined or asked by learned counsel for the defendants whether Mrs. Gouw made complaints to him about the unsatisfactory work that was being carried out. Mrs. Gouw further told the court that she was very unhappy with the end results of the decorations to the various rooms as they were most disappointing since they did not come up to her expectations in accordance with the "perspective" sketches — Exhibits P1(A), (B), (C) and (D) — that were shown to her. In this regard I would like again to refer to the evidence of Mr. Kang (DW1) in which he said and I quote:—

G "It was part of the contract that the completed work *would be like* the perspective drawings although perspective drawings are usually 'exaggerated'."

If Mrs. Gouw is to be believed, the natural thing one would have expected her to do would be to send in written complaints couched in the strongest terms possible: this she did not do. And the only complaint, in writing, that was made to the plaintiffs was a short note — admitted and marked as Exhibit D5 — dated January 28, 1974 in which she said:—

"Your letter dated 17th January 1974 was received only on 21.1.74.

Many alterations/deductions were made and the work done is not according to your quotations. Therefore I am informing you again that unless an account of the acceptable work you claim to have done is submitted and checked by me, it will not be possible to evaluate the amount due to you. The payment to account on 17.1.74 to you of \$5,000 is made as a gesture of good faith and the same in reciprocation is expected of you."

I It will be observed that this so-called written complaint was not made on her own volition, but was prompted by the plaintiffs' letter of January 17, 1974, and if I may say so such a letter is not only mild

but compromising in character and is not consistent with a person who was so dissatisfied with the work, one who is so 'fussy' according to her own evidence, and one who had complained so vehemently on numerous occasions about the unsatisfactory work that was being carried out. What is even more incredible is the fact that despite her so-called numerous complaints, invoices for new works continued to be issued by the plaintiffs and confirmation orders continued to be signed by the defendants and they stretched over a period of about one year. I did not believe her evidence and rejected it.

The criteria in this case is: The plaintiffs had performed the work in accordance with the invoices and confirmation orders as set out in the claim and as such they are entitled to payment. It was held in *Hoenig v. Isaacs*⁽¹⁾ that

"In an action on a contract for work and labour and articles supplied for a lump sum payable on completion the defendant cannot repudiate liability on the ground that the work, though substantially performed, is in some respect not in accordance with the contract, and, therefore, the defendant was liable for the balance sued for, less a deduction based on the costs of making good the defects or omissions proved."

And at page 180, Lord Denning L.J. had this to say: —

"When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is therefore construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employers from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach goes to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively, set them up in diminution of the price."

In this case, the methods of payment were clearly embodied in the invoices and confirmation orders but as the plaintiff had said in evidence that since he and the 1st defendant, John Gouw, were friends being members of the Rotary Club, he was not very rigid in enforcing payment.

The remedy for the defendants if as they alleged the work was not performed according to the specifications, or that part of the work was not done, or that materials supplied were defective and that generally the work was badly done, is to bring a cross-claim for the defects and omissions in a proper manner with supporting evidence, or, alternatively set them up in diminution of the price. The onus is upon them to show that such was the case but from the evidence before me I find that the defendants have failed to discharge that onus except in presenting odd receipts of payments and advances in respect of work which the defendants claimed to have been done by third parties and which they alleged the plaintiffs did not do without bringing in evidence. However, there was only one witness Roland Khoo (DW3) who claimed to have done the aluminium works for the defendants at their request. It should be borne in mind that this aluminium works had already been contracted for by the defendants with the plaintiffs — see AB6 and which the plaintiffs claimed to have been done. Be that as it may, the evidence of DW3 under cross-examination, left much to be desired. He is not a truthful witness

A and I rejected his evidence. Insofar as the claim concerning the lost items is concerned, I also did not believe the defendants' version. There was not an iota of evidence before the court to show that the said goods were itemised and signed by the plaintiffs as custodian on their behalf: to suggest at this late hour that "certain items", without specifying the number and the nature of the goods, were lost as a result of the plaintiffs' negligence is not only untenable but unfounded in view of the fact that there was no complaint whatever during the time in question from Mrs. Gouw who was present daily at the site and during her absence her cousin Mr. Quek stayed in the premises. I also rejected this counterclaim.

C For all these reasons and from the evidence before me, I find as of fact that the plaintiffs had substantially performed their part of the work which they contracted for and they are entitled to payment of the whole sum due and as such there will be judgment for the plaintiffs for the amount claimed with costs. The counterclaim is dismissed with costs.

Claim allowed.

Counterclaim dismissed.

Solicitors: Chor Pee & Co.; Chan, Goh & Co.

HOOI CHENG KWONG & ANOR. v. PAUL HOOI

[O.C.J. (Choor Singh J.) November 8, 1980]
[Singapore — Suit No. 2610 of 1978]

Gift — Undue influence — Special relationship of mother and son — Same counsel for both donor and donee — Whether independent legal advice essential to rebut presumption of undue influence.

F The present action was commenced by Ng Swee Kee, the mother of the defendant. She claimed that she was induced to make over certain shares to the defendant by his undue influence; that the transfer of the said shares was null and void and that she was entitled to a retransfer and delivery of the said shares. She also claimed an account of all dealings by the defendant with the said shares and payment of the amount to be due on the taking of such account.

G The pleadings alleged that the defendant and his wife virtually kept the defendant's mother a prisoner, refusing her access to the outside world and at a later stage, her solicitor assisted the defendant in procuring the shares.

Before the hearing of the case could be completed, Ng Swee Kee died. The present proceedings were thereafter continued between the plaintiffs, Executors named in the Will of the deceased and the defendant.

H **Held:** (1) where the relationship between the donor and donee has at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor, the court will set aside the voluntary gift unless it is proved that in fact the gift was the spontaneous act of the donor acting in circumstances which enabled the donor to exercise an independent will and which justify the court in holding that the gift was the result of a free exercise of the donor's will;

I (2) the mere relationship of mother and son and the fact that the two were living together is in itself not sufficient to raise the presumption of undue influence. It "suggests nothing in the way of special influence or control";

(3) if the facts show, as they did in the present case, that while the relationship of mother and son existed, the donor had very good reasons for making the gifts and excluding the other members of the family from the gifts, the court will not assume automatically that the presumption of undue influence arises. In this case there were clearly suf-